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October Term, 1956

DR. H. P. DUFF, W. E. PRATT, FLOYD PRATT, H. H. HENSLEY, H. M. HENSLEY, DR. H. HENSLEY, and AUSTIN FIELDS,

Petitioners,

vs.

F. L. CISCO'S ADM'R. (FRED BULLARD, ADMINISTRATOR WITH WILL ANNEXED OF F. L. CISCO, DECEASED) and FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

CLAUDE P. STEPHENS
Prestonsburg, Kentucky
JOE HOBSON,
Prestonsburg, Kentucky
WELDON SHOUSE,
Security Trust Building
Lexington, Kentucky
Attorneys for Petitioners

Of Counsel:
SHOUSE, BARKER & COPLIN
Security Trust Building
Lexington, Kentucky

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Petitioners,

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

To The Honorable Chief Justice And The Associate Justices of the Supreme Court of The United States:

Dr. H. P. Duff, W. E. Pratt, Floyd Pratt, H. H. Hensley, H. M. Hensley, Dr. H. Hensley and Austin Fields, the petitioners herein, pray that a Writ of Certiorari be issued to review the final judgment of the Court of Appeals of the Commonwealth of Kentucky affirming the judgment of the Circuit Court of Perry County, Kentucky.

OPINIONS OF THE COURTS BELOW

The opinion of the Perry Circuit Court is found at pages 593 to 603 of the record. Appendix A. The opinion of the Court of Appeals of Kentucky styled *H. P. Duff, et al., v. F. L. Cisco's Adm'r., et al.*, is reported in 299 SW 2d, page 99 (Advance No. 1 dated April 2, 1957). Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked for reason that the Court of Appeals of Kentucky completely disregarded and arbitrarily refused to enforce and give effect to the specific statutory remedy (Kentucky Revised Statutes, Section 62.070) provided for the enforcement of vested property rights in a surety bond contract executed by a public official (liquidator of a state bank) for the protection of creditors. By its ruling the state court left petitioners without redress or remedy of any kind. Petitioners' vested rights under the surety bond contract and the statutory remedy for the enforcement came under the protection of Article I, Section 10 and the Fourteenth Amendment of the Constitution of the United States.

(i) The opinion of the Court of Appeals of Kentucky, the highest court of the Commonwealth, was delivered on the 16th day of November, 1956.

(ii) Petition for Rehearing was filed on January 7, 1957. (R. Vol. VI, p. 5). The Court of Appeals overruled the Petition for Rehearing on March 15, 1957, and issued its mandate or final judgment on that date. (R. Vol. VI, pp. 28-29).

(iii) Jurisdiction of this court is invoked under Title 28, United States Code Annotated, Section 1257 which provides in part:

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By Writ of Certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . . ."

iv. The judgment of which review is sought is a final judgment of the Court of Appeals of Kentucky. (R. Vol. VI, p. 29). (*Chesapeake & O. R. Co.* v. *Kelly's Adm'x.*, 161 Ky. 660, 171 S.W. 182).

v. The Court of Appeals of Kentucky is the highest court of the state. (R. Vol. VI, p. 33).

(c) THE QUESTIONS PRESENTED TO THE COURT FOR ITS CONSIDERATION ARE:

(i) Where a state statute provided how and against whom actions were to be brought on a surety bond contract of a public official (which statute was the law at the time of the execution of the bond contract and when the actions thereon were instituted), did the highest court of Kentucky deprive petitioners of vested property rights without due process of law and in violation of the 14th Amendment to the Federal Constitution, when it refused to give effect to the statute, but held for the first time that another public official, not a party to the bond contract and not required by the statute to be sued, was an indispensable party, and thereupon ordered the dismissal of the actions brought against the parties named in the statute, and thereby the petitioners were left without remedy to enforce their vested contract rights?

(ii) Where a state statute named and specified the parties to be sued for breach of covenant or condition of a surety bond required to be given by a public official, and the parties so named and specified were made parties

defendant in actions on the surety bond contract, did the decision of the highest court of Kentucky, holding for the first time that another public official not named in the statute was an indispensable party and, ordering the dismissal of the actions because he was not sued, did such ruling constitute in legal effect the making by a state of a law impairing the obligations of contract in violation of Article 1, Section 10, of the Federal Constitution?

(d) CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS PETITION.

(i) Article I, Section 10, Constitution of the United States:

> "No state shall . . . pass . . . any law impairing the obligation of contracts . . ."

(ii) Fourteenth Amendment to the Constitution of the United States (Sec. 1):

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(iii) Volume II, Chapter 287, Page 24, Kentucky Revised Statutes, Section 287.570 (165a-17):

> **"Special Officers and Agents for Liquidating Institutions.** (1) The director of banking may authorize special deputy directors and may employ counsel and assistance necessary in the liquidation and distribution of the assets of a bank or trust company . . ."

(iv) Volume II, Chapter 287, Page 24, Kentucky Revised Statutes, Section 287.580 (165a-17):

> **"Special Deputy Director for Liquidation; Bond:** (1) The director of banking shall require each special

deputy director to give surety bond for the faithful performance of his duties . . ."

(v) Volume I, Chapter 62, Page 2, Kentucky Revised Statutes, Section 62.060:

"**Bonds of officers, depositories and fiduciaries; forms; conditions; amount; renewal.** (1) The bond required by law to be executed and given by any public official, depository of public funds, or any fiduciary, and other bond required by law for the discharge or performance of any public or fiducial office, trust or employment shall be a covenant to the Commonwealth of Kentucky from the principal and surety or sureties that the principal will faithfully discharge his duties, and there shall be no other obligation in the bond. The bond shall be limited in a definite penal sum which shall be determined and fixed by the officer or officers whose duty it is to approve the bond. The bond of each fiduciary shall be fixed in a penal sum of not less than the estimated value of the estate which the fiduciary is in charge of. The officer or officers taking any bond mentioned in this section may, at any time when it appears to be to the interest of the obligee, increase the penal sum of the bond or require a renewal thereof with other or additional sureties."

(vi) Volume I, Chapter 62, Page 2-3, Kentucky Revised Statutes, Section 62.070 (186d-1; 3752):

"**Action and Recovery on Bond.** Actions may be brought from time to time on any bond required by law for the discharge or performance of any public or fiducial office, trust or employment, in the name of the Commonwealth, for its benefit or for that of any person injured by a breach of the covenant or condition, at the proper costs of the party suing, **against the parties jointly or severally**, together with the personal representatives, heirs and devisees or distributees of such of them as may be dead. Recovery against the surety shall be limited to the amount of the penalty

fixed in the bond, but recovery against the principal shall not be limited by the amount of the penalty fixed in the bond . . ." (Emphasis supplied)

(iii) Carrol's Kentucky Code, Title III, Section 18, p. 7, (Baldwins 1938 Revision)

"Action to be in name of party in interest; exception. Every action must be prosecuted in the name of the real party in interest. . . ."

Section 27, CIVIL CODE OF PRACTICE, p. 12

"**Actions against decedents and persons jointly bound on contract; effect of judgment against one.** If two or more persons be jointly bound by contract, the action thereon may be brought against all or any of them, at the plaintiff's option. If any of the persons so bound be dead, the action may be brought against any or all of the survivors with the representatives of all or any of the decedents, or against the latter or any of them. If all the persons so bound be dead, the action may be brought against the representatives of all or any of them. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others."

Rule 1.340 MANDATE, ISSUANCE AND RECALL

"The issuance or recall of the mandate is within the inherent discretion of the Court, but, unless otherwise ordered or unless stayed by the filing of a petition for rehearing it will be issued by the Clerk as a matter of course immediately after thirty days excluding Sundays from the day upon which the decision is rendered. For good cause the Court may order the issuance of the mandate before that time. Upon the issuance of the mandate the Clerk of the Court of Appeals shall forthwith send the same to the Clerk of the Trial Court who shall immediately file it in the original record and note said filing on the Docket."

The Clerk of the Court of Appeals shall also send a copy of the mandate to each attorney of record."

Rule 1.360 WHEN TO BE FILED

"All petitions for rehearing shall be filed within thirty days, excluding Sundays, and any response shall be filed within ten days thereafter unless an extension of time is granted under RCA 1.370 on motion made before the petition or response is due."

(Rules — Court of Appeals, 1.340, 1.360, Kentucky Decisions 255-257 SW 2d p. 13-14)

(e) STATEMENT OF MATERIAL FACTS OF THE CASE.

On the 15th day of November, 1928, the Perry Bank & Trust Company of Hazard, Kentucky, a state bank, was placed in the hands of the State Banking Department of Kentucky for liquidation of the assets of the bank in the manner and method prescribed by law. (R. Vol. I, p. 2; Vol IV, p. 415).

On November 20, 1928, F. L. Cisco was appointed Special Deputy Banking Commissioner, hereinafter referred to as the liquidator, to administer and liquidate the assets of said bank as authorized by the provisions of Section 287.570 of the Kentucky Revised Statutes. (R. Vol. I; p. 2, Vol. IV, p. 415). On the 24th day of December, 1928, the said liquidator with the Fidelity & Deposit Company of Maryland, hereinafter referred to as "the surety", executed bond in the sum of $692,500.00 for the faithful discharge by the liquidator of all the duties of said office as required by the provisions of Section 287.580 of the Kentucky Revised Statutes (R. Vol. I, Page 64, 65, Vol. III, p. 356 and Vol. IV, p. 414), and in conformity with the requirements of Section 62.060 of the Kentucky Revised Statutes. (R. Vol. IV, p. 415).

During the ten years that the liquidator retained the assets of said bank he only collected therefrom and distributed to the depositors an amount equal to 35 per cent of the deposits. (R. Vol. I, p. 49, Vol. IV, p. 422). In May of 1938 the liquidator sold the remaining assets for the sum of $17,250.00 and on May 24, 1938, he filed his final report in the Perry Circuit Court (R. Vol. III, Pages 362-376). The liquidator's report was accepted by the Court and he and his surety were formally discharged by the Court. (R. Vol. IV, p. 422).

Dr. H. P. Duff, one of the petitioners herein, instituted on the 15th day of November, 1941, in the Perry Circuit Court, an action against the liquidator as Special Deputy Banking Commissioner and his surety seeking to recover on his own behalf and on the behalf of the other depositors of the Perry Bank & Trust Company damages for losses sustained by them by reason of the neglect and failure on the part of the liquidator to faithfully discharge his duties as Special Deputy Banking Commissioner (R. Vol. I, p. 1-65). Thereafter, two other actions were filed against the said liquidator and his surety on the bond in question. (R Vol. II, p. 198; Vol. III, p. 331). The three actions were brought pursuant to the provisions of Section 62.070 of the Kentucky Revised Statutes, and were consolidated for the purpose of trial (R. Vol. IV, p. 412).

The liquidator, after a long delay and pursuant to Court order, produced only scant records of the liquidation and as pleaded by the surety most of the records were missing and an accurate audit of the liquidation could not be had (R. Vol. III, p. 324). It, therefore, took years for the petitioners and their attorneys to ferret out the alleged facts of the gross mismanagement of the trust.

In 1954 the then Special Judge rendered an opinion that judgment be entered dismissing these actions for the reason that the Banking Commissioner of Kentucky had not been

made a party to the actions (R. Vol. V, p. 593-608) Appendix A.

The Court of Appeals of Kentucky affirmed the judgment of the Trial Court in dismissing said actions and the Court in its opinion stated:

> "Hence, the question presented by this appeal is whether or not a creditor of an insolvent bank may maintain a suit against a deputy banking commissioner for alleged violations of duty in collection and liquidation of the bank's assets, after final settlement and discharge, without joining the state banking commissioner as a party to the action."
>
> "**The question now raised has not heretofore been directly passed upon by this court** . . ." Appendix B. (Emphasis supplied)

The Court of Appeals of Kentucky in its opinion totally disregarded the fact that these consolidated actions were instituted by the petitioners pursuant to Section 62.070 of the Kentucky Revised Statutes against the principal and surety on the surety bond. The Court in refusing to give effect to the statutory remedy pursued by petitioners, stated that it had never before had the question before it as to the necessity of the State Banking Commissioner of Kentucky being made a party defendant. In thus ignoring the statutory remedy pursued by the petitioners and in dismissing their suits brought against the principal and surety on the bond contract because the State Banking Commissioner had not been made a party defendant, the petitioners vested rights under the bond contract were destroyed, and the remedy which they had pursued under the terms of Kentucky Revised Statute 62.070 was, in effect, nullified and they were left without remedy whatever.

(f) THE FEDERAL QUESTIONS WERE FIRST RAISED BY PETITIONERS IN THEIR PETITION FOR REHEARING.

By its opinion, the Kentucky Court of Appeals for the first time held that the Banking Commission of Kentucky was an indispensable party to a suit brought by depositors of any insolvent bank against the liquidator of the bank and his surety to recover damages on the surety bond contract executed in accordance with the provision of controlling statutes. The suit on the surety bond contract had been brought according to the terms of a state statute (KRS 62.070) authorizing suits in the exact manner instituted. In evading and refusing to give effect to the statutory remedy the opinion of the highest court in Kentucky had the immediate effect of denying to petitioners any remedy whatever. Therefore, the opinion of the court was the "event" which violated the Fourteenth Amendment to the Constitution of the United States, and Article 1, Section 10 thereof. Appendix C, Petition for Rehearing.

(g) ARGUMENT.

i. The Fourteenth Amendment to the Federal Constitution Was Violated by the Kentucky Decision.

A Federal Constitutional question raised for the first time on Petition for Rehearing in the highest court of a state is raised in time, where, by its decision, a state court for the first time refused to enforce the controlling and specific remedy provided by statute and, as a result of the state court's unanticipated and unprecedented decision, petitioners were deprived of any remedy whatever to enforce vested contractual rights.

Chief Justice Taft in the case of *Tidal Oil Co.* v. *Flania-*

gan, 263 U. S. 444, 68, Law Ed. 382, 387-388, 44 S. Ct. 197 stated:

> "The question in such cases could not well be raised until the handing down of the opinion indicating that the objectional judgment was to follow. This act was intended to secure to the defeated party the right to raise the question here if the state court denied the Petition for Rehearing without opinion."

Missouri ex rel Missouri Ins. Co. v. *Gehner*, 284 US 313, 74 Law Ed. 870, 50 S. Ct. 326

Brinkerhoff-Faris Trust & Sav. Co. v. *Hill Treas. etc., supra*, 281 U. S. 673, 74 Law Ed. 1107, 50 S. Ct. 451.

Saunders v. *Shaw*, 244 U. S. 317, 61 Law Ed. 1163, 37 S. Ct. 638.

The Court of Appeals of Kentucky by its opinion in this case directly evaded and disregarded the fact, pleaded by petitioners and admitted by respondents that these actions were brought upon the surety bond contract executed by the respondents. (R. Vol. IV, p. 418). The Court, likewise, disregarded and refused to give effect to the clear and unambiguous statutory remedy (Kentucky Revised Statutes, Section 62.070) pursued by petitioners, and it likewise directly evaded and disregarded the constitutional issue presented by the Petition for Rehearing. This amounted to a mere arbitrary or capricious exercise of power and constituted such a departure from fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights as to present grounds for protection of the Federal Constitution.

Traux v. *Corrigan*, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124;

Broad River Power Co., et al. v. *South Carolina, ex rel Daniel*, 281 U. S. 537, 74 L. Ed. 1023, 1030.

The opinion of the Kentucky Court is the first of its kind in the United States and does serious violence to several well established and generally accepted principles of law. The first principle that it violates is that the Kentucky Court now holds that the beneficiary of a trust must call upon the Trustee, just as though this were a derivative action, to institute a proceeding against himself in damages after final settlement and discharge. The Kentucky Court and all other courts of the United States that have discussed this problem have held that the beneficiary of a trust after final settlement and discharge may institute an independent action on his own behalf against the discharged Trustee and his surety on the surety bond contract for damages resulting from fraud or mismanagement of the trust estate. *Hall's Adm.r. v. Hall's Ex'r. etc.*, 265 Ky. 528, 97 SW 2d 23 54 Am. Jur. Sec. 556, p. 434 Trusts. 50 Am. Jur. Sec. 186 188, p. 1025 Suretyship.

The second principle equally well established being that equity will give complete relief (*Peoples Nat'l. Bank v. Glaier, et al.*, 284 Ky. 702, 145 SW 2d 1042) is repudiated when it states in its opinion:

> "If the plaintiffs were to recover any sums, as a result of these actions, the liquidation of the bank would be reopened and the banking Commissioner would be required to make another distribution of funds."

By announcing this unbelievable and unfounded new proposition of law the Court ignored its earlier statement that the trust was terminated by final settlement discharge: ignored the fact that this is a statutory action on a contract under KRC 62.070, and further ignored the universal principle that, "A Court of Equity will give complete relief".

The decision of the Court of Appeals of Kentucky on this non-federal ground is so certainly unfounded that it may be properly regarded as essentially arbitrary or a

mere device to prevent a review of its decision upon the Federal question and, therefore, the Supreme Court has the right to determine whether or not the Court of Appeals denied the Federal right or did not give it due recognition.

Ward v. *Love County*, 253 U. S. 17, 22, 64 L. Ed. 751, 758, 40 S. Ct. 419;
Lawrence v. *State Tax Commission of the State of Mississippi*, 286 U. S. 276, 76 L. Ed. 1102, 52 S. Ct. 556, 87 ALR 374;
Leathe v. *Thomas*, 207 U.S. 93, 99, 52 L. Ed. 118, 120, 28 S. Ct. 30;
Vandalia Railroad Co. v. *Indiana*, 207 U. S. 359, 52 L. Ed. 246, 248, 28 S. Ct. 130;
Enterprise Irrig. Dist., et al. v. *Farmers Mut. Canal Co., supra*;
Johnson v. *Risk*, 137 U. S. 300, 34 L. Ed. 683, 11 S. Ct. 111;
Indiana ex rel. Anderson v. *Brand*, 303 U. S. 95, 667, 82 L. Ed. 685, 1123, 58 S. Ct., 443, 641; 113 ALR 1482;
Traux v. *Corrigan*, *supra*.

A surety bond executed by a public official, appointed to liquidate an insolvent bank, is a contract made for the benefit of the depositors or other persons damaged by the misconduct of the official. *Commonwealth* v. *Shepperd*, 5 Ky. L. Rep. 767; *Tyler* v. *Exchange Bank of Kentucky*, 9 Ky. L. Rep. 195; *Chappell* v. *Fidelity and Deposit Co. of Maryland*, 9 S.E. 2d 592; 22 R. C. L. 496; 43 Am. Jur. Sec. 394, Public Officers 173; KRS 62.070.

At the time of the execution of the surety bond contract, this specific statutory remedy was afforded for the bringing of actions against the principal and surety on the bond, and this remedy was in effect at the time the actions on the surety bond contract were instituted by petitioners.

This existing remedy for the enforcement of the contract became a part of its obligation protected by constitutional

provisions from impairment. *Walker* v. *Whitehead*, 83 U. S. 314, 21 L. Ed. 357, 16 Wall. 314; *Edwards* v. *Kearzey*, 96 U. S. 595, 24 L. Ed. 793; *Worthen ex rel: Board of Comrs.* v. *Kavanaugh*, 295 U. S. 56, 79 L. Ed. 1298, 55 S. Ct. 555, 97 ALR 905.

The opinion of the Court of Appeals, totally disregarding any reference whatever to the statutory remedy pursued by petitioners, and the ruling of the court refusing to give effect to the remedy given by statute to petitioners denied to them their property rights in the surety bond contract, and constituted such arbitrary action on the part of the court as to deny due process of law guaranteed under the Fourteenth Amendment to the Federal Constitution. A State, acting through its courts, may not strip a party of all remedy to enforce vested contract rights without violating fundamental principles of right and justice which the guaranty of due process in the 14th Amendment is intended to preserve. *Traux* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124; *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill, supra*; *Coombes* v. *Getz*, 285 U. S. 434, 76 L. Ed. 866, 52 S. Ct. 435.

The due process clause of the 14th Amendment restrains action of state courts and judicial officers in their official capacities within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings. *Ownbey* v. *Morgan*, 256 U. S. 94, 65 L. Ed. 837, 41 S. Ct. 433, 17 ALR 873; *Brinkerhoff-Faris Trust & Sav.* v. *Hill, supra*; *Shelly* v. *Kraemer*, 334 U. S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, 3 ALR 2d 441.

After the liquidator of the bank had made his final report to the court, and he and his surety had been discharged by order of court, the petitioners, as creditors of

the bank, under the provisions of Kentucky Revised Statutes 62.070, had vested contractual rights in the surety bond contract executed by the liquidator of the bank for their benefit, and they had a vested right of action thereon for damages sustained by reason of the liquidator's failure to properly account for several hundred thousand dollars of trust funds. *Coombes* v. *Getz*, 285 U. S. 434, 76 L. Ed. 866, 52 S. Ct. 435; *Ettor* v. *Tacoma*, 228 U. S. 148, 57 L. Ed. 773, 33 S. Ct. 428; *Pritchard* v. *Norton*, 106 U. S. 124, 132, 27 L. Ed. 104, 107, 1 S. Ct. 102.

ii. Article I, Section 10 of Federal Constitution was Violated by the Kentucky Decision.

This Court held in the case of *Gelpcke* v. *Dubuque*, 68 U. S. 175, — S. Ct. —, 17 Law Ed. 520 at 525:

> "The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the Government, and administered in Courts of Justice its validity and obligation cannot be impaired by any subsequent action of the Legislature, or decisions of its Courts altering the construction of the law."

The foregoing statement of the law was adopted by the Courts of Kentucky in the case of *Oliver Co.* v. *Louisville Realty Co.*, 156 Ky. 628, 161 SW 2d, 570 at 577, and reaffirmed in the case of *Drane* v. *Weston, et al.*, 276 Ky. 810, 125 SW 2d 722 at 724:

> "(1) Section 19 of our Constitution provided: 'No * * * law impairing the obligation of contracts, shall be enacted.' If under our Constitution it were permissible for the legislature to pass special acts annulling or dissolving municipal corporations, the courts would not hesitate to condemn any such act in so far as it attempted to or had the effect of impairing the obli-

gation of the contracts of the municipality dissolved. It follows, therefore, that a court may not consistently so interpret or administer an act relating to that subject that would have such effect and result in the evils intended to be prevented by the framers of the constitution when they enacted section 19."

The present action in the Kentucky Court was an action on a surety bond contract and was instituted in the manner provided by statute. This Court stated in the case of *William Filene's Sons Co. v. Weed*, 245 U. S. 597, 38 S. Ct. 211, 62 Law Ed. 497 at —:

"When a statutory system is administered the only question for the Court is what the Statute prescribes."

It was further stated in the case of *International Bank v. Sherman*, 101 U. S. 403, — S. Ct. —, 25 Law Ed. 866 at 867:

"The statute is clear and imperative. Its constitutional validity is not questioned. It contains no qualification. We cannot interpolate what is claimed. Such a function is beyond the sphere of our power and duty. It is our business to execute the law as we find it, and not to make or modify it."

It was further stated in the case of *Houston & Texas C.R. Co. v. Texas*, 177 U. S. 66, 44 Law Ed. 673, 20 S. Ct. 545 that the refusal of a state Court to give effect to a State Statute the obligation of a contract is impaired even though the Court does not mention the statute.

In refusing to enforce the unambiguous and unmistakeable provisions of Section 62.070 Kentucky Revised Statutes, being the specified remedy provided for the enforcement of vested property rights in the surety bond contract executed by a public official, the Kentucky Court of Appeals acted arbitrarily and in abuse of its power.

The legal effect of the State Court's decision was to amend the Statute by judicial fiat, and in thus exceeding its power and exercising legislative functions the State Court impaired the obligation of the contract sued on, in violation of Article I, Section 10 of the Federal Constitution. *Appleby* v. *Delaney*, 271 U. S. 403, 70 L. Ed. 1009, 46 S. Ct. 581.

It was the duty of the Court to enforce the statutory remedy as written. It was the function and duty of the Kentucky Court to execute KRS 62.070 as they found it and not to modify or amend it. The principle is well established that a Court cannot go beyond the terms of a Statute, since they do not have the power of legislation. *Del Monte M. & M. Co.* v. *Last Chance M. & M. Co.*, 171 U. S. 55, 43 Law Ed. 72, 18 S. Ct. 895; *Ebert* v. *Poston*, 266 U. S. 548, 69 Law Ed. 435, 45 S. Ct. 188; *Barrett* v. *Indiana*, 229 U. S. 26, 57 Law Ed. 1050, 33 S. Ct. 642 at 692.

Therefore, in ignoring and refusing to enforce the statutory remedy by dismissing petitioners three actions and leaving them without any remedy whatsoever, because they had not originally sued a party not required to be sued by the Statute, the State Court in effect amended the Statute and applied its ruling retroactively so as to impair the obligation of contract. Although acting in a legislative capacity and in violation of its constitutional power the legal effect of the Court's opinion was the same as if the legislature of Kentucky had amended 62.070 KRS while these suits were pending. This constituted the making of law impairing the obligations of contract in violation of Article I, Section 10 of the Federal Constitution. *Appleby* v. *Delaney*, *supra*; *People of the State of New York on the relations of Emeline F. Clyde* v. *John F. Gilchrist, P., et al., as members of State Tax Com. of the State of New York*, 262 U. S. 94, 67 L. Ed. 883, 43 S. Ct. 501.

The petitioners respectfully submit that the Writ of Certiorari should issue to the end that this court may review the decision of the Court of Appeals of Kentucky and determine whether that court has deprived petitioners rights guaranteed by Article I, Section 10 and the Fourteenth Amendment to the Federal Constitution.

CLAUDE P. STEPHENS
Prestonsburg, Kentucky
JOE HOBSON,
Prestonsburg, Kentucky
WELDON SHOUSE,
Security Trust Building
Lexington, Kentucky
Attorneys for Petitioners.

Of Counsel:

SHOUSE, BARKER & COPLIN
Security Trust Building
Lexington, Kentucky

I hereby certify that I have served a copy of the within petition for Writ of Certiorari on F. L. Cisco's Administrator by depositing a copy in a United States mail box with first class postage prepaid addressed to W. E. Faulkner, Hazard, Kentucky, Attorney for said Respondent; and I have also served a copy on the Fidelity and Deposit Company of Maryland by depositing a copy in a United States mail box with first class postage prepaid addressed to Middleton, Seelbach, Wolford, Wiliis & Cochran, 501 So. Second Street, Louisville 2, Kentucky, Attorneys for said Respondent, on this 3— day of June, 1957.

Joe Hobson

APPENDIX A

MEMORANDUM OPINION OF PERRY COUNTY CIRCUIT COURT

DR. H. P. DUFF, ET AL.,

Plaintiffs,

vs.

F. L. CISCO'S ADMR. and FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Defendants.

The Perry Bank and Trust Company was closed by action of its directors on November 15th, 1928, and its affairs placed in the hands of the Banking Commissioner for liquidation. Thereafter in January 1929 F. L. Cisco was appointed Special Deputy Banking Commissioner and the liquidation of said institution was placed in his hands. He executed bond in the original sum of $692,500.00 with the Fidelity and Deposit Company of Maryland as surety. Mr. Cisco continued in such capacity through out the liquidation and on the 12th day of May 1938 his final settlement was filed with and approved by the Perry Circuit Court, and he and his surety were discharged from further authority and liability. No exceptions were filed or taken to this final settlement.

There are three actions pending in the Perry Circuit Court attacking this settlement. On the 15th day of November 1941, Dr. H. P. Duff filed the first suit as what

is called throughout this record a "class suit" on behalf of himself and all creditors. On March 4th, 1942, Judge Rogert R. Friend was appointed Special Judge in this case, and after a hearing entered a judgment holding that it was not such a suit as could be prosecuted in a representative capacity or as a "class suit" and dismissed the action as to all members of the class except Dr. Duff. The plaintiff in that suit refusing to plead further the petition was dismissed. An appeal was granted to all the dismissed parties and Dr. Duff. The appeal was never perfected.

On August 31, 1942, W. E. Pratt and others brought another class action; and on May 22, 1943, Dr. H. P. Duff and five other creditors brought a third and similar action. These three suits involve the same cause of action that is the surcharge on the settlement of F. L. Cisco and his acts as Special Deputy Banking Commissioner in Liquidating the affairs of the Perry Bank and Trust Co.

In February 1944 Judge J. D. Harkins having been appointed Special Judge in these actions entered an order consolidating the three actions apparently for the reason that they involved the same cause. He overruled special demurrers and motions to strike in the second and third suits, thereby permitting the second and third suits to proceed as class suits. Thus we have rulings of Judge Friend and Judge Harkins directly in conflict.

It appears that a motion was made before Judge Harkins to set aside so much of his order as permitted the second and third suits to proceed as class actions. However, before this motion was passed upon Judge Harkins was succeeded by Judge R. L. Maddox, and these motions were heard by him and overruled. The judgment of Judge Friend in the first case has not been overruled, vacated, or set aside.

This brief resume is only the beginning of a voluminous record of contradictions. Many of the records of this

liquidation are missing. This Court, after several months, agrees with the statement made in an oral argument in Versailles in August 1953, that an audit of this settlement cannot accurately be made from the present records.

The liquidation of insolvent Banks is controlled by Secs. 165A14, 165A15 and 165A17, now KRS 287.560, 287.570, 287.600 and 287.610, and by these statutes the duties are invested in the Banking Commission. These provisions are all inclusive. There are no other methods prescribed for the liquidation of insolvent banks. The Banking Commissioner was not made a party, the Deputy Banking Commissioner was made a party defendant.

The first question we will discuss, was the Banking Commission a necessary and indispensible party to these actions? The defendants claim that before the creditors could maintain these actions a demand must be made upon the Banking Commissioner to do so and that he must fail or refuse to act. In support of this conclusion the defendants rely upon the hereinabove cited sections of the statutes and the cases of *Tipton's Admr.* v. *Ball*, 256 Ky. 816, 77 SW (2nd) 50, *Williams* v. *Boyd*, 263 Ky. 438, 92 W (2nd) 783, *Ball* v. *Tipton*, 242 Ky. 181, 45 SW (2nd) 1044, *Hall's Assignee* v. *Rothschild*, 102 Ky. 582, 44 SW 108, *S. Bank* v. *Caperton*, 87 Ky. 306, 8 SW 885, *Scholl* v. *Allen, Judge*, 237 Ky. 716, 36 SW (2nd) 353, *Deering* v. *Stites*, 257 Ky. 403, 78 SW (2nd) 46.

In the *Tipton* v. *Ball* our Court after discussing liquidation of insolvent Banks under our voluntary assignment Statute prior to the enactment of our present statute in 1912, and reviewing the cases said:

> "In denying the right of a creditor to maintain an action like this without first requesting the assignee to bring it we said in the case of Hall's Assignee vs. Rothschild, 102 Ky. 582, 44 SW 108 therefore it was

indispensible to the Appellees in this case, in order to maintain their action, to allege that the appellants assignee had, upon demand, refused to institute the necessary proceedings to set aside said mortgage."

The Court then said:

"That rule is to the effect that no such action may be maintained by a beneficiary without first making demand of the trustee to bring it followed by his refusal. See Deering et al vs. Stites, 257 Ky. 493, 78 SW (2nd) 46, decided Dec. 11, 1934."

The Court then concluded that before Tipton could maintain this action in his own individual name (even if it were one for the benefits of creditors generally and not for his exclusive benefit) it was necessary for him to allege and prove, if denied, that he requested the Banking Commissioner to take action followed by his refusal or declination to do so.

This being the second appeal of this case. The first is *Bell* v. *Tipton*, 272 Ky. 181, 45 SW (2nd) 1044. That case was reversed upon the sole ground that the Banking Commissioner had not been summoned when that was done and the Banking Commissioner was brought before the Court the six months limitation had run. This lead the Court to say:

"The banking Commissioner, as we have said, was not brought into the case until more than six months after the attacked assignment and transfer had been made, which was at a time when he himself could not have brought the action in his fiduciary capacity, since the time of doing so is limited to six months after the preference was made and which fact constitutes a material distinction between this case and the Wisdom Case, supra, even if the Banking Commissioner had attempted to waive such condition precedent but which he did not do. Therefore, there

exists in this case no reason why the right of action should be upheld or why such precedent condition should not be enforced."

In the case of *Williams* v. *Byrd*, *supra*, the Court said:

"The Banking and Security Commissioner, not a liquidating agent, has exclusive jurisdiction over banks and he was both a necessary and proper party to this action. Ball vs. Tipton, 242 Ky. 181, 45 SW (2nd) 1044. Wilson Banking Commissioner vs. Louisville Title Co., 244 Ky. 683, 51 SW (2nd) 971, Commonwealth ex rel. Denny vs. Hargis Bank & Trust Company, 233 Ky. 801, 26 SW (2nd) 1045. There is no allegation in the petition as amended that the Banking and Security Commissioner had been requested, and had refused, to institute this or any action against Boyd. There is no allegation in it that Williams or any one acting with him or even his attorney, had requested the liquidating agent to institute, and he had refused to institute, this or any other action against Byrd.

To manifest his right to maintain this action, it was indispensible for Williams in his own behalf and that of all other depositors to allege positively that the banking and securities commissioner had been requested; and he had refused, to bring an action on the causes of action set up in petition. Tipton vs. Ball et al, 256 Ky. 816, 77 SW (2nd) 50."

In the case of *Scholl* v. *Allen, Judge*, 237 Ky. 716, 26 SW (2nd) 353-359, the Court said:

"A demand upon the receiver and a refusal by him to sue are prerequisites to the right of stockholders to maintain such an action, and then the receiver should properly be made a defendant to any suit by stockholders to enforce the right of corporation. This doctrine seems to be uniformly recognized and held."

Citing a long line of cases both domestic and foreign.

This Court cannot agree with plaintiff's position on this question. They say in their briefs reciting no authority for the assertion, viz:

> "Defendants argue the case should be dismissed because the Banking Commissioner was not made a party, or called upon to bring the suit, and failed to do so. Many cases are cited to uphold the rule that while a liquidation is going on or while an estate is being administered, the proper person to bring an action to collect the assets of the estate is by the Commissioner or administrator and if he had not been asked and fails to bring the suit, a dismissal of the suit is proper. However, learned counsel cites no case in his excellent brief which upholds the novel doctrine that you must ask the administrator to bring a suit against himself on his bond for dereliction of duty. There could be no point in getting the consent of the Banking Commissioner to bring the suit, or making him a party, because the liquidation was over, all the assets were disposed of, and he had been released by the Court. This being a suit on the bond of the liquidator for failure to do his duty, the banking department has no interest in it except to try to defend the liquidator as best they can, and this they have done. About all they have said in his favor is that the responsibility belongs to Mr. Cisco to liquidate according to their rules. There is nothing to this point."

The above is the entire argument made by the plaintiffs on this point. We find no authority, and none has been called to our attention, forming a legal basis supporting this argument; in view of what we believe is the contrary holding as expressed by the above quoted authorities. There appears to be reason for the rule requiring the Banking Commissioner or any fiduciary or trustee to be made a party. The statutes vests the duty of liquidating insolvent Banks exclusively in the Banking Commissioner.

The Courts have no authority to liquidate such insolvent institutions. If the plaintiffs were to recover any sum as a result of these actions, this liquidation would be reopened and he would be required to make this distribution. Therefore not being a party the Court could not order or direct that official in any manner. In view of the authorities above referred to the Banking Commissioner should have been made a party to this action. He should have been called upon to institute this action and if he refused then he should have been made a party either plaintiff or defendant, so the Court could acquire jurisdiction over the Banking Commissioner. The Court should have required the Commissioner to be made a party. Sections 22, 23, 24 of the Civil Code of Practice is ample authority for this action.

There is no allegation in either of the petitions alleging that the Banking Commissioner was called upon to institute these or any other action or that he refused. It is testified that C. E. Duff and Claude Stephens, his attorney on Oct. 2, 1945, made demand on H. H. Smith Banking Commissioner to join in the prosecution of these actions, and that he declined. This demand was made more than seven years after the settlement was made and approved by the Court. Hence, after the time the Banking Commissioner could have himself instituted the action. *Tipton* v. *Ball*, 256 Ky. 816, 77 SW (2d) 50.

To make an order now requiring the Banking Commissioner to be made a party could serve no purpose. The Statutes of limitation have barred all action he could initiate at this time.

The irreconcilable confusion and contradiction in these actions may in the main be attributed to the fact that there has been some seven Special Judges in these cases, each passing on some of the involved questions of the law. This Court will make no attempt to bring harmony from

the legal chaos further than to exercise his judgment on the questions now presented.

We are concerned with the effect of Judge Friend's order dismissing the first petition and granting an appeal which was never prosecuted. If Judge Friend's order is a final appealable order, then right or wrong it must prevail until vacated. If a final order then it was an adjudication of the matter set out in the second and third suits, and while pending was a legal bar to the maintenance of the second and third suits on the same cause of action.

We will not now attempt to say whether the first suit or any suit can be maintained as a "class suit." That was the question before Judge Friend. The question before us is the legal status of his order on that question. It may be necessary after answering that question then to pass on the question of whether these actions may be prosecuted in a representative capacity. The three pending suits are so called "class suits", and as Judge Harkins said involves the same cause of action. That Dr. Duff was attempting to prosecute this action as a class action is admitted. It is equally true that Judge Friend's order denied him that right. That issue was a material and paramount one at that time and now. Then it follows, was Judge Friend's order on the merits of the case:

> "The Rule is stated in *30 Am. Jur.* page 920, sec. 178, *Judgments*, which text reads:
>
> > 'It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action and were there admitted or judicially determined are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata, and may not again be litigated in a subsequent action between the same parties or their privies.'

"This same authority *30 Am. Jur.* page 944, sec. 208, continues:

> 'In stating the doctrine of res judicata the Courts usually refer to the fact that the judgment sought to be used as a basis of the doctrine was rendered upon the merits, since it is a general rule that a judgment rendered on any grounds which do not involve the merits of the action may not be used as a basis for the operation of the doctrine of res judicata. Under the rule, an adjudication on grounds purely technical where the merits cannot come into question is limited to the point actually decided, and does not preclude the maintenance of a subsequent action brought in a way to void the objections which proved fatal in the first action; as to the technical point decided, however, the judgment is conclusive, even though it is not conclusive as to merits of the entire controversy.'

"This rule finds support in our domestic cases of Batman vs. Louisville Gas & Electric Co., 187 Ky. 659, 220 SW 318, Wood vs. Dowing, Admr., 62 SW 487."

It is true that a judgment to be a bar to future actions for same cause must be made on the merits. *Pepper* v. *Donnally*, 87 Ky. 259, 8 SW 441, *Thomas* v. *Boyd*, 91 Ky. 5, *Bitzen* v. *O'Bryan*, 107 Ky. 599, *Potter* v. *Benge*, 67 SW 1005. However, no decision has been cited or found that conclusively defines the line of demarcation between judgments on merits and judgments on technicalities. Hence, in a measure each case must be viewed on its facts, and circumstances.

In an annotation found in *149 ALR*, Page 597, Ann. 4, *Dismissal*, based upon a technical defect. It is stated:

> "Where a judgment dismisses an action on account of a formal or technical defect, the fact that by its terms it is without prejudice does not prevent it from being res judicata as to the formal or technical defect

> actually adjudicated and from precluding the plaintiff from maintaining another action upon the same cause if this other action has the same defect as the former action."

This annotation states that in order to sustain a subsequent action it is necessary to obviate the defect which proved fatal in the former action, citing *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. Ed. 238, *Alexander* v. *Bryant*, 110 U. S. 414, 28 L. Ed. 195, *Cunningham* v. *Alexander*, 98 F. 657 (CCA 7th). In further support of this rule is cited *American Law Institutes, Restatement of the Law of Judgments* #39, and the annotation further says:

> "There is not much direct authority on this question apparently because as a rule a plaintiff whose action has been dismissed without prejudice in order to allow him to obviate a technical defect, does not insist upon repeating the same defect in his subsequent action."

We have concluded, from a study of the above authorities, that the judgment in the first action is res judicata, at least, as to the question of class action. The basic error found fatal in Judge Friends order was not obviated in the second or third suits but was repeated.

It appears to us that in this action that that order has an element of finality and that so long as it remains in force not repealed, vacated or set aside it cannot be ignored. That is true whether the order is right or wrong. The finality of an order upon purely technical grounds and on questions similar to that presented by this case, that is a dismissal upon grounds purely technical has been upheld by our courts. See *Dudley* v. *Scholl*, 9 Bush 576, *Helm* v. *Short*, 70 Ky. (7 Bush) 623, *Applegate* v. *Applegate*, 61 Ky. (4 Met) 236, *Harrison* v. *Lebiannon Water Works*, 91 Ky. 258, 15 SW 522, *Wood* v. *Downing, Admr.*, 62 SW 487,

Randolph v. *Snyder*, 139 Ky. 159, 129 SW 562, *West* v. *King*, 163 Ky. 561, 174 SW 11, *Wilson* v. *DeLoach*, 123 Ky. 393, 96 SW 514.

We have discussed the two questions not in their numerical order, that is in the order they have been presented in both briefs. We have discussed them first for the reason this whole case depends upon a correct answer to these material points. There are some other legal questions involved that should be examined. The point is made that Mr. Cisco was only the agent of the Banking Commissioner, hence was immune from civil liability for his acts. His acts were the acts of the Banking Commissioner. This officer was vested with wide discretionary power. This same latitude extends to his agent. Thus the rule has been announced that the Commissioner's acts must be judged with a liberal rather than a strict interpretation of his statutory duties. *McIntosh* v. *Wilhoit*, 279 Ky. 675, 132 SW (2nd) 39, *Callopy* v. *Dorman*, 250 Ky. 513, 63 SW (2nd) 610. The rule as stated in *43 Am. Jur.*, page 85, sec. 273, says:

> "As a rule a public officer, whether judicial quasi-judicial or executive, is not personally liable to one injured in consequence of an act performed within the scope of his official authority, and in line of his authority. In order that acts may be done within the scope of his official authority, it was not necessary that they be prescribed in statutes, or even that they be specifically directed or requested by a superior officer, but it is sufficient if they are done by an officer in relation to matters committed by law to his control or supervision, or that they have more or less connection with such matters, or that they are governed by a lawful requirement of the department under whose authority the officer is acting."

This text in a footnote refers to the case of *Cooper* v. *O'Connor*, 99 Fed. (2nd) 135. (Both briefs cite a case styled

Cooper v. *O'Conner*, 105 F. (2nd) 761). This general rule appears to have been adopted and sanctioned in this state. *J. E. Schneider & Sons* v. *Watt*, 252 SW (2nd) 898; *Taylor* v. *Glotfelty*, 201 Fed. (2nd) 51. An annotation in 38 A.L.R. indicates that this rule is uniform with the exception of *Idaho Mills* v. *American Surety Co.*, 26 Idaho 652, 145 P. 1097 Ann. cases 1916E 209.

It follows as a natural corollary that if the administrative officer, and his subordinates are immune from civil liability for their official acts then their surety would likewise be free from civil liability.

We are of the opinion that in a suit such as this, for an accounting, or whatever we have, against a surety, if the suit can be maintained at all, is controlled by the seven year statute of limitation. No action on this bond could have been instituted until those parties, protected by the indemnifying intent of the bond, had sustained a loss. This essential fact could not have been ascertained until the final settlement was made in May 1938.

It is argued, by the defendants, that the petition should be dismissed for the reason that Mr. Cisco's settlement had been approved by the Court and he and his surety discharged and that to then surcharge his settlement the specific acts must be pleaded. This action is novel, it is out of bounds of every precedent. It is in a class all alone in many of its baffling questions. We have read and reread the pleadings. We are of the opinion that the petitions and amendments are good and sufficient against demurrer, and such demurrers having by another judge been overruled we are not inclined to disturb that ruling.

Lastly the defendant contends that the action should be dismissed because of plaintiffs laches. This we cannot sustain. It is true that these matters have been in the Court for a long period of time. Length of time is not

always the controlling question in applying the law of laches. There has been something like seven Special Judges in this case, each serving for a short time, making orders, often times conflicting ones. There has been an equal number of Lawyers in the case each acting for a time and then abandoning it. Little or no co-operation between the Judges or the Lawyers. Each came into the case new and uninformed. There has been a tremendous amount of research done in this case. It took considerable time. In the main we cannot say that the delays have been culpable laches.

We are of the opinion this consolidated action should be dismissed. A judgment has been drawn as herein indicated directing the dismissal of this action giving plaintiffs proper exceptions and objections and granting them an appeal to the Court of Appeals. Copy of judgment is attached hereto.

Respectfully submitted,

A. J. BRATCHER
Special Judge Perry Circuit Court

APPENDIX B

OPINION OF THE COURT OF APPEALS OF KENTUCKY

(CAPTION OMITTED)

BY COMMISSIONER WADDILL:

AFFIRMING

On November 15, 1928, the Perry Bank & Trust Company of Hazard closed and placed its affairs in the custody of the State Banking Department. F. L. Cisco, Deputy Banking Commissioner was assigned to liquidate the bank. Cisco's final settlement was approved by the circuit court and he and his surety, Fidelity & Deposit Company of Maryland, were discharged in May, 1938.

Between 1941 and 1943, three separate suits were filed in the Perry Circuit Court against F. L. Cisco by creditors of the Perry Bank & Trust Company charging violations of duty on the part of Cisco in failing to collect certain alleged assets of the insolvent bank. These actions sought to surcharge the liquidator's final settlement and prayed for judgments against him and his surety in substantial sums.

In 1954, after these cases had been consolidated and had been passed on to some extent by several special judges, judgment was entered dismissing the action. The ground for dismissal was the failure to make the State Banking Commissioner a party to the action.

Under the Statute, which was in effect when the Perry Bank & Trust Company closed in 1928, (Acts 1912, C. 4, Sec. 17; Ky. Statute, Sec. 165a-16; presently KRS 287.560),

the state banking commissioner had exclusive jurisdiction in the liquidation of insolvent banks. *Young* v. *Banker's Trust Co's Receiver*, 250 Ky. 1, 61 S.W. 2d 904; *Wilson* v. *Louisville Trust Co.*, 242 Ky. 432, 46 S.W. 2d 767; *Commonwealth* v. *Hargis Bank & Trust Co.*, 233 Ky. 801, 26 S.W. 2d 1045; *Cartmell* v. *Commercial Bank & Trust Co.*, 153 Ky. 798, 156 S.W. 1048. And, in construing this statute, this Court held that the banking commissioner was an indispensable party to an action brought against his deputy before final settlement and discharge. *Williams* v. *Byrd*, 263 Ky. 438, 92 S.W. 2d 783; *Tipton's Adm'x* v. *Ball*, 256 Ky. 816, 77 S.W. 2d 50; *Ball* v. *Tipton*, 242 Ky. 181, 45 S.W. 2d 1044. Hence, the question presented by this appeal is whether or not a creditor of an insolvent bank may maintain a suit against a deputy banking commissioner for alleged violations of duty in the collection and liquidation of the bank's assets, after final settlement and discharge, without joining the state banking commissioner as a party to the action.

The question now raised has not heretofore been directly passed upon by this Court. However, the circuit court held that the cases holding the banking commissioner to be an indispensable party during liquidation were applicable to the case at bar, and as a reason for their application, said:

> "The statute rests the duty of liquidating insolvent banks exclusively in the banking commissioner. The courts have no authority to liquidate such insolvent institutions. If the plaintiffs were to recover any sum as a result of these actions, the liquidation of the bank would be reopened and the banking commissioner would be required to make another distribution of funds. Therefore, not being a party, the court could not order or direct that official in any manner. * * *."

The reasoning of the circuit court seems to be sound. In suits of this character the general rule appears to be that

an action may not be maintained against a subordinate official without joining his superior as a party if the relief sought will require such superior to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him. In such cases the superior official is an indispensable party. See, *Williams* v. *Fanning*, 332 U. S. 490, 68 S. Ct. 188, 92 L. Ed. 95; *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, 17 S. Ct. 225, 41 L. Ed. 621; *May* v. *Maurer*, 185 F.2d 475.

Certainly the successful prosecution of this case would cause the state banking commissioner to take further action. Therefore, we think the circuit court was correct in deciding that the state banking commissioner was an indispensable party to the action.

Judgment affirmed.

ATTORNEYS FOR APPELLANTS:
CLAUDE P. STEPHENS
Prestonsburg, Kentucky
WELDON SHOUSE
Security Trust Bldg.
Lexington, Kentucky
JESSE K. LEWIS
Bank of Commerce Building
Lexington, Kentucky

ATTORNEY FOR APPELLEE
FIDELITY & DEPOSIT CO. OF MARYLAND:
LEO T. WOLFORD
501 South Second St.
Louisville, Kentucky

ATTORNEY FOR APPELLEE
F. L. CISCO'S ADMINISTRATOR:
W. E. FAULKNER
Hazard, Kentucky

APPENDIX C

PETITION FOR REHEARING IN THE COURT OF APPEALS OF KENTUCKY

(CAPTION OMITTED)

The appellants, Dr. H. P. Duff, et al., move the court to grant them a rehearing herein and for the following reasons:

I

THE OPINION OF THE COURT IS IN DIRECT CONFLICT WITH CONTROLLING PROVISIONS OF THE CIVIL CODE OF PRACTICE AND KENTUCKY STATUTES, AND HAS THE IMMEDIATE EFFECT OF DESTROYING PLAINTIFFS' VESTED RIGHTS AND IMPAIRING THE OBLIGATIONS OF THE CONTRACT SUED ON, ALL IN VIOLATION OF THE CONSTITUTIONS OF THE UNITED STATES AND KENTUCKY.

This court, in its opinion, fails to state the nature of these consolidated cases, but leaves the impression that these actions are brought under the banking laws of Kentucky. Upon this false premise this court, for the first time in Kentucky, holds that the banking commissioner should have been made a party. By this incorrect holding the court wipes out all of the vested property rights of the depositors of the Perry Bank & Trust Company and leave

them completely helpless without rights or remedy. There could be no greater miscarriage of justice or violation of constitutional rights.

When F. L. Cisco was appointed Special Deputy Banking Commissioner to liquidate the assets of the Perry Bank & Trust Company he executed bond in the sum of $692,000.00 as required by KRS 287.580. KRS 62.060 defined the nature and terms of the bond to be executed by Mr. Cisco.

In its opinion, the court completely ignores the undisputed fact that these actions were brought by the depositors of the Perry Bank & Trust Company pursuant to the authority of KRS 62.070, which statute specifically provides that actions may be brought from time to time on any bond required by law for the discharge or performance of any public or fiducial office. This statute gives the unqualified right for any person injured by the breach of the covenant or condition of such a bond to sue the *parties thereon* jointly or severally. These actions are such actions as are authorized to be brought by this statute and it is not therein required that the banking commissioner or any other outsider be made a party. *Only the parties on the bond could be sued jointly or severally according to the terms of this statute. The court's opinion is in direct conflict with this controlling statute.* (Italics ours throughout this brief) By referring to each of the three petitions filed in these cases the court can see that these actions are brought on the official bond of Mr. Cisco against him and his surety. (Tr, Vol. I, p. 1; Vol. II, p. 198; Vol. III, p. 329). Each petition sets out many breaches of the covenant or condition of the bond. Under the provisions of Section 18 of the Civil Code of Practice it was mandatory that these actions be prosecuted in the name of the real parties in interest. From an early date this court has

consistently held that actions on official bonds executed to the Commonwealth may be brought in the name of the real parties in interest. *Commonwealth* v. *Shepperd*, 5 Ky. L. Rep. 767, *Tyler* v. *Exchange Bank of Kentucky*, 9 Ky. L. Rep. 195; *Howard* v. *Brown*, 13 Ky. L. Rep. 271; *Bolton* v. *Ayers*, 33 Ky. L. Rep. 591, 110 SW 385, *Layne* v. *Kasey*, 58 Ky. 410.

In the *Commonwealth* v. *Shepperd* case, this court pointed out that bonds executed by public officials for the performance of official duties, by the breach of which an individual may be damaged, are *contracts* made with the Commonwealth for the benefit of the person injured. Such is the general rule. *Chappell* v. *Fidelity & Deposit Company of Maryland*, 9 SE 2d 592; 22 RCL 496; 43 Am. Jur. p. 173, Sec. 394 Public Officers.

Since there can be no question but what these are actions on the official bond of Mr. Cisco against him and his surety for breach of duty on the part of Mr. Cisco, there is no basis or reason whatever for the court's holding that the banking commissioner should have been made a party in these law suits. The action is for the breach of the bond and the banking commissioner has no connection with or relation to this matter at all, and KRS 62.070 specifies who may be made parties. It cannot be successfully maintained that the banking commissioner claims an interest in the bond sued on or that he is a necessary party to a complete determination of the violations of said bond. He had none of the assets of said Perry Bank & Trust Company and therefore no money judgment could be had against him. As pointed out by this court in the case of *Louisville Rail-Way Co.* v. *Simons*, 187 Ky. 301, 219 SW 162, a plaintiff is not required to make anyone a party against whom at a hearing he cannot have a judgment. The plaintiff can have no judgment against the banking commissioner in

the suit on the bond, therefore under the law he is not a necessary party.

As the court does state in its written opinion, it was not the law in this Commonwealth, when Mr. Cisco executed his official bond on December 24, 1928, that the banking commissioner was required to be made a party in a suit on the bond. It was not the law of the Commonwealth on May 24, 1938, when Mr. Cisco made his final report to the court and he was discharged that the banking commissioner was required to be a party defendant in a suit on the bond. Such was not the law of this Commonwealth, as this court states in its written opinion, when Dr. H. P. Duff filed suit on the bond on November 15, 1941. In November 1941, the plaintiffs pursued the remedies authorized by the provisions of 62.070 KRS and Section 18 of the Civil Code of Practice. Their rights under the bond had become vested and they had a vested right in the cause of action which they asserted under the then provisions of law on the bond contract executed by Mr. Cisco and his surety.

The court's opinion holding the law to be as of the date of the opinion that the banking commissioner was a necessary party has the direct effect of impairing the obligation of the bond contract sued on and of destroying plaintiffs vested rights in their cause of action against the principal and surety on said bond. The court's opinion directly violates the provisions of Article I Section 10 of the Constitution of the United States which prohibits any state from passing any law impairing the obligations of contract. The opinion of the court shows that it was not the law of Kentucky in November 1941 that the banking commissioner was required to be made a party in a suit on the contract. Therefore, this court's decision destroying plaintiffs' vested rights in the contract and in denying plaintiffs' rights to proceed further to recover on the contract con-

stituted action on the part of the state of Kentucky destroying vested rights and impairing the obligation of contract, all of which is prohibited by said section of the Constitution of the United States. The opinion of the court also violates Section 19 of the Constitution of Kentucky, which prohibits the enactment of any law impairing the obligation of contracts. This court in the case of *Olive Co.* v. *Louisville Realty Co.*, 156 Ky. 628, 161 SW 570, 577, has adopted the rule laid down in the Supreme Court case of *Gilpche* v. *Dubuque*, 68 U. S. 175, 17 L. Ed. 520, as follows:

> "The sound and true rule is that if the contract, when made was valid by the laws of the state as expounded by all departments of the government and administered in its courts of justice, its validity and obligation can not be impaired by any subsequent *act of legislation or decision of its courts altering the construction of the law.*"

Also see *Kentucky Home Life Insurance Co.* v. *Johnson*, 93 SW 2d 863, 263 Ky. 787 and cases cited therein. The Supreme Court of the United States has faithfully held that state action may be either through the legislature, the judiciary, executive or administrative branches of government. *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill, Treas., etc.*, 281 U. S. 673, 74 L. Ed. 1107, 50 Sct. 451; and that existing remedies for the enforcement of a contract at the time of its execution are part of its obligation, which the state may not so change as to impair a substantial right. *Walker* v. *Whitehead*, 83 U. S. 314, 21 L. Ed. 357; *Edwards* v. *Kearzey*, 96 U. S. 595, 24 L. Ed. 795.

To give retroactive effect to the opinion of this court would be to violate and impair the obligation of contract, and plaintiffs' vested rights therein, and in the remedies existing at the time of the execution of the contract. This court has stated that when a controversy is pending before

a judicial tribunal concerning legal rights already defined and fixed by existing laws the legislature has no power to interfere by retroactive legislation for the benefit of one litigant and destroying or impairing the rights of the other. *Thweatt* v. *Bank of Hopkinsville*, 81 Ky. 1. And, of course, this principle applies equally to the judiciary, as stated above.

II.

THE COURT'S OPINION VIOLATES THE PROVISIONS OF SECTION 14 OF THE CONSTITUTION OF KENTUCKY AND DEPRIVES THE PLAINTIFFS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIES TO PLAINTIFFS THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is provided in Section 14 of the Constitution of Kentucky that every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

When plaintiffs filed their actions on the official bond contract executed by F. L. Cisco and the Fidelity & Deposit Company of Maryland, they proceeded according to due course of law as provided by Section 62.070 KRS and Section 18 of the Civil Code of Practice. This court in its opinion and for the first time and in contradiction of these remedies and rights which became a part of the bond contract at the time of its execution denies to plaintiffs all their rights and all their property unlawfully confiscated by Mr. Cisco, simply by holding that the banking commissioner was not made a party defendant, and which was

not required by law or decision of this court at the time the contract was entered into or at the time the suits were filed. If this does not deny due process of law and the equal protection of the laws then no case of such a nature can ever be had.

A like case showing how the Supreme Court of the state of Missouri violated due process of law is that of *Brinkerhoff-Faris Trust & Savings Co., supra.* The Supreme Court of Missouri changed its former opinion and held directly opposite thereto. The plaintiffs filed Petition for Rehearing setting out that the court's new opinion in the construction of a state statute transgressed the due process clause of the 14th Amendment. Justice Brandise pointed out in his opinion, when the case reached the Supreme Court of the United States, that "then it was too late for the plaintiff to avail itself of the newly found remedy." Such is the situation in the instant case. This court does not send this case back for the banking commissioner to be made a party defendant but it wipes out plaintiffs' rights completely by affirming the judgment of the lower court which dismissed plaintiffs' petitions. In the *Brinkinhoff* case the Supreme Court pointed out that due process of law extends to state action through judicial as well as legislative, executive or administrative branches of government and that state courts must accord plaintiffs due process in determining objective and substantive law of the state.

In view of the fact that plaintiffs' right to enforce and sue on the bond contract executed by Mr. Cisco and the Fidelity & Deposit Co. of Maryland, became vested after the liquidator of the bank had made his final report and had been released, a decision of this court at this time having the effect of changing the provisions of 62.070 KRS and controlling provisions of the Civil Code cannot defeat plaintiffs' vested rights under said bond contract without

violating both the Constitution of Kentucky and the Constitution of the United States. The purpose of the 14th Amendment to the Constitution of the United States was to preserve fundamental principles of right and justice and to prevent purely arbitrary and capricious exercise of power on the part of state officials whether they be legislative, executive or judicial and to prevent wrongful and highly injurious invasion of property rights and stripping the owners of property of all remedy. See the opinion of Mr. Chief Justice Taft in the case of *Truax* v. *Corrigan*, 257 U. S. 317, 66 L. Ed. 254, 42 Sct. 124, 27 ALR 375, 384. It can hardly be doubted that fundamental principles of right and justice are being denied to the appellants in the instant case. A serious question as to due process of law is further involved herein by reason of this court's failure to correctly state in its opinion the true nature of this case. This court is trying this equity case anew and the appellants are entitled to have the nature of the case correctly stated. *We repeat that this is an action on a bond contract executed for appellants' benefit. They are the only parties in interest.* Their rights and the remedies protecting these rights became vested when the contract was executed and this court is now for the first time in Kentucky rewriting the law as to who are proper parties which has the immediate effect of destroying these vested rights and of denying due process of law to the plaintiffs.

III

THIS COURT IS IN ABSOLUTE ERROR IN HOLDING THAT THIS MATTER WOULD HAVE TO BE RE-REFERRED TO THE BANKING COMMISSIONER FOR DISTRIBUTION OF ANY PART OF A JUDGMENT THAT THE COURT MIGHT RENDER ON THE BOND CONTRACT.

This court is clearly in error in holding that if any sums were recovered in these actions the liquidation of the bank would be reopened and the banking commissioner would be required to make another distribution of funds. We again come back to the real nature of these suits which is that they are actions on the official bond of a public officer. The lower court trying these actions would determine and adjudicate from the evidence the amount of money that the plaintiffs would be entitled to recover against Mr. Cisco's estate and his surety on the bond. That this is the law there can be no question. As pointed out by the Supreme Court of New York in the case of *Illinois Surety Co.* v. *Mattone*, 122 NYS 928, the surety company "is liable in the aggregate only to the amount of its undertaking, and that amount constituted a fund for the payment of the creditors pro rata, and is to be distributed among them equitably according to their respective claims." The New York court applied the funds to the creditors in such action. The very nature of these actions would require the court in which the case is pending to fully determine the rights of each creditor or depositor and to finally give judgment to each one as his rights appear. The trial court could not and would not give up its equitable duties and powers to fully adjudicate all the rights and issues involved in these cases. In the many cited cases in Annotation 128 ALR 1096 it is made clear that courts of equity distribute the

funds recovered in judgments against officers and sureties on their official bonds. No outsider would have any rights or duties in such a matter. Since the trial court alone would have the power and authority to award judgment to each of the plaintiffs as their rights appear it is certain that the cases cited in the court's opinion have no application to the question here presented.

This is not an action against a subordinate officer which required that his superior also be made a party. Under the banking laws of Kentucky, Mr. Cisco was appointed Special Deputy Banking Commissioner to liquidate the assets of the Perry Bank & Trust Company. His office was provided for by law. As such officer he improperly performed those duties and these actions are against him and the surety on his official bond. We repeat, these are actions on the bond contract. The rule laid down in the cases cited in the court's opinion could have no application here. But the cases cited by the court do show that the Banking commissioner is not required to be made a party. The rule cited in the *May* v. *Maurer* case, 185 Federal 2d 175, would be here controlling as the court there said:

> "Where a subordinate official 'invades a private right whether by exceeding his authority or by carrying out a mandate of his superior', and a decree in an action brought against such subordinate official 'will effectively grant the relief' sought 'by expending itself on the subordinate official', and will not interfere with the public administration, 'the superior of such subordinate is not an indispensable party'."

This same rule is stated in 43 Am. Jur. Section 281, page 94. The appellees in the instant case, the defendants below, make no claim that there is any liability that should be shared by the banking commissioner on the bond executed and upon which these suits are based. The appellants

certainly make no claim of any liability on the part of the banking commissioner and, of course, there is none. Mr. Cisco was appointed to liquidate the bank as provided by law and he and his surety are liable under the provisions of Section 62.070 KRS for his misappropriation of the funds entrusted to him under the law.

When Mr. Cisco was appointed Special Deputy Banking Commissioner to liquidate the assets of the defunct Perry Bank & Trust Company, as provided by law and when he and the Fidelity & Deposit Company of Maryland executed the bond contract upon which these suits are based it was then settled law by decisions of this court that suits filed during the time of the liquidation of the bank and concerned with the liquidation had to be brought in the name of the banking commissioner. But as this court admits in its opinion, it was not the law at the time that the bond contract was executed that the banking cominissioner had to be made a party after the liquidation had been completed and the liquidator had been discharged by the court, where suit was brought on the bond contract. The court's opinion for the first time writes into the banking laws of Kentucky and adds on to KRS 62.070 the provision that in an action on the bond of the liquidator, the banking commissioner must be made a party. Since this was not the law at the time the bond contract was entered into, the effect of this opinion is to violate the aforesaid constitutional provisions prohibiting the impairment of the obligations of contract. However, by its opinion this court is taking the very position that it has repeatedly said it has no right to take. As can readily be seen there is not a word, line or syllable either in the banking law, or in the provisions of KRS 62.070 upon which this court can place any construction that the banking commissioner is a required party to these actions. This

is clearly a violation of Sections 27 and 28 of the Constitution of Kentucky. Time and time again this court has said that it has no power to amend statutes, but that its authority ends at the border line of interpretation. *City of Louisville* v. *Fidelity and Columbia Trust Co., et al.*, 245 Ky. 704, 54 SW 2d 40. In the instant case this court does not suggest or even intimate that there is a word, line or syllable in KRS 62.070, or in any section of the banking law that it is interpreting. The most that the court suggests is that it is extending the interpretation of those cases holding that under the banking laws of Kentucky, suits must be brought in the name of the banking commissioner *during the time of liquidation*. There could be no clearer case of usurpation of judicial power. There is no provision whatever in the banking laws of Kentucky which this court can properly interpret and come to the decision which it has reached in this case. The banking statutes are absolutely silent on this question. *However, KRS 62.070 contains positive provisions as to who shall be made parties in a suit on the bond contract.* Such violation of the constitutional mandate laid down in Sections 27 and 28 of the Constitution of Kentucky violates Article I, Section 10 of the Constitution of the United States, Section 19 of the Constitution of Kentucky and as impairing the obligation of contract, and likewise Section 14 of the Constitution of Kentucky and the 14th Amendment to the Constitution of the United States by denying due process of law and the equal protection of the laws.

IV

THE OPINION AND JUDGMENT OF THE TRIAL COURT AND THE OPINION AND ADJUDICATION OF THIS COURT CONTRAVENES, NOT ONLY KRS 62.070, BUT SECTIONS 27 AND 28 OF THE OLD CIVIL CODE OF PRACTICE.

Therefore and by reason thereof plaintiffs and appellants are denied due process of law and the equal protection of the law in violation of Section 14 of the Kentucky Constitution and the 14th Amendment to the Constitution of the United States and said violation of said code provision impairs the obligations of contract sued on in violation of Article I, Section 10 of the Constitution of the United States and Section 19 of the Constitution of Kentucky.

This court by its opinion holds that the banking commissioner is a necessary party solely for the purpose of distributing any funds that might be recovered on the bond sued on. Therefore, under the provisions of Section 28 of the old Civil Code of Practice, it is the duty of this court to reverse the judgment of the lower court and to send the case back with directions that the banking commissioner be made a party for the purposes specified in the court's opinion, as it is there mandatorily required that if the court cannot determine any controversy between the parties before it without prejudice to others it *must* require such other persons to be made parties. We emphasize and reiterate that under the provisions of 62.070 and Section 27 of the old Civil Code of Practice the plaintiffs had the unqualified right to sue either one of the parties to the bond contract (either Mr. Cinco, the liquidator of the bank or the Fidelity & Deposit Company of Maryland, surety on his bond), but since this court

by its opinion and for the first time in Kentucky holds that the banking commissioner should be made a party for the purpose of distributing any funds which might be recovered on said bond and in order that plaintiffs' rights may be protected and justice done, the court should order and direct that the case be sent back for complete adjudication and that the banking commissioner be made a party for the purpose stated by this court in its opinion. It is clear cut and certain that the trial court erred in not ordering the banking commissioner to be made a party, if he thought he was a necessary party.

The immediate effect of the opinion and adjudication of the trial court and this court that the banking commissioner should be a party, and the dismissal of the plaintiffs' suits because he was not made a party, violates the aforementioned provisions of our State and Federal Constitutions, *as said courts' opinions and adjudications destroy the appellants' rights under the contract sued on and denies to them all relief and remedy whatever.*

It would appear quite certain that the banking commissioner is not a necessary and essential party to these actions on the bond contract to distribute any money that might be recovered on the bond contract, and this court, in so holding that he is a necessary party, contradicts a basic principle of equitable jurisprudence which this court has repeatedly pronounced. In the case of *Eastland* v. *Robinson*, 233 Ky. 403, 25 SW 2d 1028, this court pointed out that where a court of equity has jurisdiction of a subject, it would comprehend within its grasp and decide all incidental matters necessary to enable it to make a full and final determination of the whole controversy and thus determine the litigation. Under this well established principle of equity it would be the duty of the trial court to adjudicate and determine and award to each of the depositors of the bank whatever sum each of them would

be entitled to after the whole controversy had been determined. The banking commissioner could not conceivably have any connection with the damages that might be awarded to plaintiffs on the bond contract.

CONCLUSION

The appellants, Dr. H. P. Duff, et al., specifically plead and state that this and the trial court's opinion and adjudication that the banking commissioner was a necessary party, and this court in sustaining the dismissal of these suits because he was not made a party defendant in the lower court, constitutes an effort on the part of the court to legislate and by judicial decree to amend the hereinabove named provisions of the old Civil Code of Practice of Kentucky and of the named provisions of the Kentucky Statutes, and that such effort to amend said provisions of law as of this date and to make said amendment retroactive to the time that these actions were filed leaves appellants without remedy of law since the court by its opinion affirms the dismissal of plaintiffs' cases; and they plead and state that thereby said opinion and adjudication of this court and the trial court violates Section 19 of the Kentucky Constitution and Article I, Section 10, of the Constitution of the United States as same constitutes action by the state of Kentucky impairing the obligations of contract; and appellants further plead and state that said opinion and adjudication and its retroactive application resulting in the dismissal of appellants' actions leaves appellants without remedy of law and constitutes a violation of Section 14 of the Constitution of Kentucky denying due process of law, and that said opinion and adjudication violates the 14th Amendment to the Constitution of the United States for reason that said opinion and adjudication constitutes action on the part of the state of Kentucky depriving ap-

pellants and those for whom they sue of property without due process of law and denies to appellants and those for whom they sue the equal protection of the laws.

Appellants plead and state that the trial court's failure and refusal to afford plaintiffs the rights and remedies on said bond contract sued on in existence and in effect at the time the contract was entered into impairs the obligations of contract in violation of Section 19 of the Constitution of Kentucky and Article I, Section 10 of the Constitution of the United States; and they plead and state that the failure and refusal of the trial court and the failure and refusal of this court to afford to plaintiffs the rights and remedies existing at the time said bond contract was entered into as provided by said statutes and Civil Code provisions and the dismissal of plaintiffs said actions leaving them without rights or remedies under said bond contract constitutes a violation of Section 14 of the Constitution of the United States in that they are denied due process of law and the equal protection of the laws.

WHEREFORE, the appellants, Dr. H. P. Duff, et al., pray that their Petition for Rehearing be granted and that the opinion of the court be withdrawn for the reasons and upon the grounds hereinabove stated and that an opinion be written reversing the judgment of the trial court.

Respectfully submitted,

GLAUDE P. STEPHENS
Attorney-at-Law
Prestonsburg, Ky.
WELDON SHOUSE
Attorney-at-Law
Security Trust Bldg.
Lexington, Kentucky
Attorneys for Appellants

APPENDIX D

MANDATE

THE COMMONWEALTH OF KENTUCKY
The Court of Appeals, Fall Term, November 16, 1956

DR. H. P. DUFF, ET AL.,

vs.

F. L. CISCO'S ADMR., ET AL.

Appeal from a Judgment of the Perry Circuit Court

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said Court.

It is further considered that the appellees recover of the appellants their cost herein expended.

A copy Attest: -

/s/ DORIS OWENS, C. C. A.
By EDWARD L. BRYANT, D. C.

Issued March 15, 1957

Office - Supreme Court, U.S.
FILED
JUL 3 1957
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

October Term, 1956

NO. ~~1068~~ 173

DR. H. P. DUFF, W. E. PRATT, FLOYD PRATT, H. H. HENSLEY, H. M. HENSLEY, DR. H. HENSLEY, and AUSTIN FIELDS, Petitioners,

versus

F. L. CISCO'S ADMR. (Fred Bullard, Administrator with the Will annexed of F. L. Cisco), and
FIDELITY & DEPOSIT COMPANY OF MARYLAND, Respondents.

On Petition for Writ of Certiorari to the Kentucky Court of Appeals.

BRIEF FOR RESPONDENTS IN OPPOSITION.

W. E. FAULKNER,
Hazard, Kentucky,
LEO T. WOLFORD,
EUGENE B. COCHRAN,
501 S. 2nd Street,
Louisville 2, Kentucky,
Counsel for the Respondents.

MIDDLETON, SEELBACH, WOLFORD, WILLIS & COCHRAN,
Of Counsel.

June 28, 1957.

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Supreme Court of the United States

October Term, 1956

No. 1068.

DR. H. P. DUFF, W. E. PRATT, FLOYD PRATT, H. H. HENSLEY, H. M. HENSLEY, DR. H. HENSLEY, and AUSTIN FIELDS, *Petitioners,*

v.

F. L. CISCO'S ADMR. (Fred Bullard, Administrator with the Will Annexed of F. L. Cisco) and FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Respondents.*

On Petition for Writ of Certiorari to the Kentucky Court of Appeals.

BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondents, F. L. Cisco's Administrator and Fidelity & Deposit Company of Maryland, pray that the Petition for Writ of Certiorari to the Kentucky Court of Appeals be denied.

STATUTES INVOLVED.

[Ky. Stat. 165a-17; Acts of 1912, c. 4, p. 8, §17]

"The banking commissioner may, under his hand and official seal, appoint one or more special deputy banking commissioners, as agent or agents, to assist him in the duty of liquidating and distributing the assets of any insolvent bank. * * *"

[Carroll's Ky. Code, §18]

"Every action must be prosecuted in the name of the real party in interest * * *."

[Kentucky Court of Appeals Rule 1.090]

"In every appeal the appellant shall file with the record a statement showing:

"1. The name of the appellant or appellants, designated as such * * *."

STATEMENT OF THE CASE.

In November, 1928, Perry Bank and Trust Company of Hazard, Kentucky, closed its doors. The State Banking Commissioner appointed F. L. Cisco as his agent and Special Deputy Banking Commissioner to liquidate the bank. Cisco executed a bond to the Commonwealth of Kentucky with Fidelity & Deposit as surety.

In May, 1938, the court entered a final judgment confirming Cisco's final settlement and discharged Cisco and his surety (R. 281, 422).

In 1941 and 1943, three separate suits (later consolidated) were filed by seven individual creditors as class suits to surcharge Cisco's final settlement and to recover on the bond.

In March, 1942, the court adjudged that this kind of suit could not be maintained as a class suit and by final judgment dismissed the action as to all members of the represented class (R. 73). No appeal was ever perfected.*

In April, 1944, the defendants by special demurrer (R. 68-70, 77-9, 245-7, 388-96) and answer (R. 79-183, 414-22) denied the material allegations of the complaints and pleaded specially (R. 416) that:

> "Plaintiffs do not have legal capacity to sue, and there is a defect of parties plaintiff in each of the petitions filed by them in the following respects, to-wit:
>
> "(1) None of the said plaintiffs has made demand upon or requested the Banking and Securities Commissioner or the State Director of Banking to maintain any action on account of the matters set out in the plaintiffs' petitions herein."

In March, 1954, the trial court by judgment dismissed the complaints (R. 607) on the ground, among others, that the plaintiffs had not called on the Banking Commissioner to bring the action, or made him a

*Two years later, a Special Judge in the second and third suits, before consolidation, took a different view (R. 249-254), but the March, 1942 judgment had become final and binding on all members of the class at that time (R. 600-603).

party, although he had exclusive jurisdiction to liquidate insolvent banks (R. 595-600).*

On November 16, 1956, the Kentucky Court of Appeals affirmed the judgment of the trial court on the grounds that under the statute "the State Banking Commissioner had exclusive jurisdiction in the liquidation of insolvent banks," (2) he was "an indispensable party" to the action, and (3) "an action may not be maintained against a subordinate official without joining his superior as a party if the relief sought will require such superior to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him."

Although the Respondents had pleaded in 1944, and the trial Court had adjudged in 1954, that demand on the Banking Commissioner was a prerequisite and that he was a necessary party, the Petitioners did not make the constitutional claims they now rely upon until in January, 1957, when they filed their Petition for Rehearing in the Kentucky Court of Appeals.

*The Petitioners cite (Pet'n. p. 8) a pleading filed in 1953 (R. 324) to the effect that the records in the circuit court, the Banking Commissioner's office and other records were so incomplete that an audit was not possible. This was twenty-five years after the bank closed and the Petitioners' statement erroneously implies that Cisco was responsible for this condition.

ARGUMENT.

Three of the Petitioners have been dead many years without revivor of the action. The Petitioner, Dr. H. Hensley, died on March 27, 1943. The Petitioner, H. M. Hensley, died on March 26, 1946. The Petitioner, H. H. Hensley, died early in 1951 (R. 585-6).

Two other Petitioners, W. E. Pratt and Floyd Pratt, did not appeal to the Kentucky Court of Appeals. The only appellants in the Court of Appeals were Dr. H. P. Duff and Austin Fields (see Statement on Appeal to Kentucky Court of Appeals filed June 2, 1954).

Manifestly the three who have died and the two who were not parties in the Kentucky Court of Appeals, are not entitled to petition this Court for the writ.

FIRST POINT.

The Petitioners Have Not Shown Any Adequate Ground For Writ of Certiorari.

The Kentucky Court of Appeals construed the Kentucky statute to mean that the Banking Commissioner had exclusive jurisdiction to liquidate insolvent banks.

The Court had theretofore held that the Banking Commissioner was a necessary party to any suit brought against the deputy *before* the deputy's final settlement and discharge (*Tipton's Admx.* v. *Ball*, 256 Ky. 816, 821, 77 S. W. 2d 50; *Williams* v. *Byrd*, 263 Ky. 438, 439, 92 S. W. 2d 783, 784).

Here, that Court held the Banking Commissioner was a necessary party to a suit brought against the deputy *after* settlement and discharge. It said the relief sought would require the Banking Commissioner himself to take action (*Williams* v. *Fanning*, 332 U. S. 490). The decision should reasonably have been anticipated because of the prior decisions holding the Banking Commissioner to be a necessary party in suits brought before settlement and discharge. This decision was only a logical extension of those prior decisions.

That the precise question has not arisen since enactment of the statute in 1912 shows that this is not a question of great public importance. The case turns upon its own facts and will affect no others than the litigants.

Even if a writ should be granted, the Court will not likely reach the constitutional questions because of the presence of other controlling questions. For instance:

(*a*) The essential allegations of the complaints are denied in the answers (R. 79-182, 414) and the record brought up from the trial Court does not contain the evidence. Accordingly, the only question presented is the sufficiency of the pleadings to support the judgment (*Smith* v. *Corum*, 308 Ky. 397, 398, 214 S. W. 2d 599).

(*b*) Cisco was only an agent of the Banking Commissioner who was charged by statute with the duty of liquidating the bank. In carrying out the instruc-

tions of the Banking Commissioner, Cisco was immune from civil liability (*Cooper* v. *O'Connor*, 105 F. 2d 761; *Taylor* v. *Glotfelty*, 102 F. Supp. 7, 9; *J. F. Schneider & Son* v. *Watt* (Ky.) 252 S. W. 2d 898-901).

(*c*) There was no sufficient allegation of fraud to surcharge the settlement (*Wren's Ex'r* v. *Wren's Ex'r*, 126 Ky. 704, 708, 104 S. W. 737).

SECOND POINT.

The Constitutional Questions Relied Upon Are Raised Too Late.

Although the necessity of making the Banking Commissioner a party was specially pleaded in 1944 (R. 416), and decided adversely to the Petitioners by the trial court in 1954 (R. 595-99), the Petitioners did not either in the trial court, or in the Kentucky Court of Appeals before the decision, in any way assert the constitutional claims on which they now rely. They first asserted these claims in the Kentucky Court of Appeals in their Petition for Rehearing filed in January, 1957, which was overruled without additional opinion or comment in March, 1957.

By the decisions of this Court these Federal questions were not raised in time (*Forbes* v. *State Council of Va., etc.*, 216 U. S. 396; *Citizens Nat'l Bank* v. *Durr*, 257 U. S. 99, 106; *Herndon* v. *Georgia*, 295 U. S. 441; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 181).

This is not a case where the first opportunity to raise these federal questions came with the Appellate Court's decision.

THIRD POINT.

The Kentucky Court of Appeals' Decision Does Not Deny the Petitioners Due Process of Law or Violate the Obligation of Contract.

The Petitioners contend that KRS 62.070 gave them a contractual right to sue on the bond without joining the Banking Commissioner.

The decision of the Kentucky Court of Appeals only holds, in the light of its previous decisions (*Tipton's Admx.* v. *Ball*, 256 Ky. 816, 821, 77 S. W. 2d 50) that prior demand on the Banking Commissioner, as the real party in interest, is necessary, and that he is an indispensable party. This is in no way contrary to the language of the statute.

The Kentucky Court of Appeals construed Ky. Stat. §165a-16, presently KRS 287.560, as giving the Banking Commissioner "exclusive jurisdiction in the liquidation of insolvent banks." It held that because of that fact he was an indispensable party. KRS 62.070 permits actions to be brought in the name of the Commonwealth "for its benefit or for that of any person injured." The Banking Commissioner, as the real party in interest, is "a person injured" by a breach of the bond, and is a necessary party.

In requiring demand on the Banking Commissioner and that he be made a party, the Court was merely

following a long-established rule in Kentucky which goes back as far as 1898 (see *Tipton's Admx.* v. *Ball*, 256 Ky. 816, at 820-1, 77 S. W. 2d 50).

The Petitioners did not attempt to comply with that statute. The statute provides that suits may be brought "in the name of the Commonwealth." The Petitioners did not bring their suits in the name of the Commonwealth (R. 1, 198, 329). The statute did not give any right to the Petitioners to bring the suits in their own individual names.*

This is not a case where the Kentucky Court of Appeals construed the statute contrary to a previous construction. The decision cannot be said to violate the contract clause or to deny due process (*Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 449-53).

CONCLUSION.

The Petition for Writ of Certiorari should be denied.

W. E. FAULKNER,
Hazard, Kentucky,

LEO T. WOLFORD,
EUGENE B. COCHRAN,
501 South 2nd Street,
Louisville 2, Kentucky,

Counsel for the Respondents.

MIDDLETON, SEELBACH, WOLFORD,
WILLIS & COCHRAN,
Of Counsel.

June 28, 1957.

*This bond did not contain any covenant for the benefit of third persons (*Keene* v. *Colker*, 1 Metc. (Ky.) 415). The covenant ran only to the Commonwealth (*Hughes* v. *Cotton*, 13 Bush (Ky.) 596).

Pursuant to Rule 33, I certify that I have served a copy of this Brief in Opposition to the Petition for Writ of Certiorari on the Petitioners; by depositing a copy thereof in a United States Post Office, with first-class postage prepaid, addressed to counsel of record at his post office address, to-wit: to Claude P. Stephens, Prestonsburg, Kentucky; to Joe Hobson, Prestonsburg Kentucky; and to Weldon Shouse, Security Trust Building, Lexington, Kentucky, all done this July 2, 1957, at Louisville, Kentucky.

Counsel for the Respondents.